IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.03.2018

PRONOUNCED ON : 03.04.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.446 of 2003

1. M/s.Bhagat & Co.,
   Rep.by its Partner A.Bhagat
   D.No.74, Jambulingam Street,
   Shevapet, Salem Town,
   Salem – 636 002.

2. Ali Akbar,

3. Ali Askar ... Appellants

Vs.

1. S.Vijayan
2. S.Angappan ... Respondents

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 27.02.2003 passed in A.S.No.148 of 2001 on the file of the I Additional District Court cum Chief Judicial Magistrate Court, Salem, reversing the Judgment and Decree dated 07.06.2001 passed in O.S.No.1134 of 1996 on the file of the II Additional District Munsif court, Salem.

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For Appellants : Mr.S.Mukundan
for M/s.Sarvabhauman Associates

For Respondents : No appearance
Set exparte (vide Order dt.19.03.2018)

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JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 27.02.2003 passed in A.S.No.148 of 2001 on the file of the I Additional District Court cum Chief Judicial Magistrate Court, Salem, reversing the Judgment and Decree dated 07.06.2001 passed in O.S.No.1134 of 1996 on the file of the II Additional District Munsif court, Salem.

2. The second appeal has been admitted and the following substantial question of law was formulated for consideration:

> ***" Having accepted that the plaintiffs had acquiesced in the activities of the defendants, assuming it is illegal, has not the lower appellate Court exceeded it's legal jurisdiction, while reversing the judgment of the trial Court directing the defendants to close down the ventilators in the said offending wall? "***

3. The suit has been laid by the respondents / plaintiffs for the reliefs of Permanent injunction and mandatory injunction against the appellants / defendants on the footing that the defendants had put up a construction over the common wall belonging to the parties by

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trespassing over the same and by leaving openings and putting up windows, ventilators, etc., and accordingly, complaining that the defendants are not entitled to put up the construction by trespassing over the portion, where, the common wall lies, the plaintiffs have levied the suit against the defendants.

4. In brief, the defendants have taken the plea that the construction put up by them lies within the property, to which, they are entitled to and the case of the plaintiffs that the defendants had trespassed over the alleged common wall and put up a construction is false and further, it is also pleaded by the defendants that the plaintiffs had not putforth any objections as regards the construction put up by the defendants in their property and in such view of the matter, when the defendants had already put up and completed the construction, the reliefs sought for by the plaintiffs had become infructuous and therefore, the suit is liable to be dismissed.

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5. In support of the plaintiffs' case, PWs1 & 2 were examined and Exs.A1 to A11 were marked. On the side the defendants' DW1 was examined and Exs.B1 & B2 were marked.

6. The trial Court, on the basis of the materials placed on record and the submissions made, held that the Wall on the southern side of the

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suit property is a common wall. However, proceeded to hold that inasmuch as the entire construction had already been put up by the defendants in their property and the construction has also been completed, the relief sought for by the plaintiffs by way of permanent injunction had become infructuous and accordingly, negatived the said relief sought for by the plaintiffs. Further, the trial Court has also noted that the plaintiffs had not raised any objection whatsoever, while the construction had been put up by the defendants in their property and accordingly, the plaintiffs having also failed to establish that the defendants had put up the construction by trespassing into the plaintiffs' property in any manner and accordingly, further holding that the law will not extend a helping hand to a sleeping person and accordingly, holding that the plaintiffs' are guilty of laches and also noting the acquiescence on the part of the plaintiffs in watching the construction put up by the defendants without raising any objection at the earliest point of time, accordingly, negatived the relief of mandatory injunction sought for by them and resultantly, dismissing the suit laid by the plaintiffs.

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7. The first appellate Court, on appeal by the plaintiffs, found concurrence with the determination of the trial Court that the relief of permanent injunction sought for by the plaintiffs had become infructuous, inasmuch as the defendants had already put up the construction in the property belonging to them and the construction had also been completed

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and hence, accordingly concurred with the determination of the trial Court that the plaintiffs being guilty of laches and showing acquiescence in the construction put up by the defendants without any protest as such over a long period of time held that the plaintiffs are not entitled to the relief of mandatory injunction sought for by them. It is thus found that the first appellate Court, in all aspects, concurred with the judgment and decree of the trial Court.

8. However, while determining the point as to what relief the plaintiffs are entitled to, the first appellate Court, on the footing that inasmuch as the construction put up by the defendants leaving openings passages and putting up windows, ventilators over the same would affect the privacy of the plaintiffs in future, the defendants may stake a claim of easementry right over the plaintiffs' property for light and air and thereby, prevent the right of the plaintiffs from putting up new construction over the property, proceeded to hold that the plaintiffs are entitled to for permanent injunction restraining the defendants and their men from preventing the plaintiffs putting up any construction in future, if any, over their property upto the height permitted by the Corporation or height of the defendants' property and for mandatory injunction to close the openings facing the plaintiffs' property left by the defendants in their wall raised on the party wall with built with bricks or with permanent non transparent glasses and accordingly, disposed of the first

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appellate Court by granting the abovesaid reliefs in favour of the plaintiffs. Impugning the same, the present second appeal has been laid.

9. When it is found that the suit has been laid by the plaintiffs for restraining the defendants and their men from in any way interfering with the peaceful possession and enjoyment of the suit common wall by putting up any new construction by leaving any openings passage followed by putting up windows, ventilators over the same by means of permanent injunction and for directing the defendants to remove all the new construction of the wall or any windows or ventilators that were left over in the suit existing old wall by means of mandatory injunction**,** when the Courts below had, on noting that the defendants had already put up the construction in their property and proved the same, the relief of permanent injunction sought for by the plaintiffs had become infructuous and also further noting that the plaintiffs being mute spectators to the construction put up by the defendants and not having raised objection to the same at the earliest point of time held that on account of the laches and acquiescence on the part of the plaintiffs as abovestated, also refused the relief of mandatory injunction sought for by the plaintiffs.

10. In such view of the matter, when the reliefs sought for by the plaintiffs had been negatived by the trial Court as well as the first appellate Court and when the plaintiffs have not sought for any relief that

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on account of the construction put up by the defendants, they would be affected in future, in case, there is any further construction put up in their property and there is the possibility of the defendants claiming easementary right for light and air as against the plaintiffs, in that view of the matter, the first appellate Court seems to have manifestly committed an error in granting the limited reliefs in favour of the plaintiffs for future as against the defendants by way of permanent injunction and mandatory injunction. However, when, with reference to the abovesaid determination of the first appellate Court, there are no pleadings in the plaint and the defendants had not been called upon to answer such issues raised during the course of the arguments before the first appellate Court and that apart, when the parties had not proceeded with the trial that the construction put up by the defendants in the property would affect the future construction that may be put up by the plaintiffs in their property by way of the defendants claiming easementary right for light and air, as rightly argued by the defendants' counsel, the first appellate Court seems to have overreached itself and assuming that the defendants may claim easementary right for light and air in respect of the construction already put up by them in future, when the plaintiffs proceed with any construction in their property, erred in granting the limited reliefs as aforestated in favour of the plaintiffs by modifying the judgment and decree of the trial Court, when it is found that the plaintiffs had not putforth any objection whatsoever for the construction put up by the

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defendants and the construction had also been completed. As rightly putforth, without any pleadings/evidence, the first appellate Court seems to have exceeded its legal jurisdiction in granting the reliefs in faovur of the plaintiffs anticipating that in future, the plaintiffs may suffer on account of the construction that had been put up by the defendants in their property. In other words, it is found that the first appellate Court seems to have provided materials in favour of the plaintiffs or given a cause of action to the plaintiffs for laying a suit against the defendants in future, in the event of any construction that may be put up by them in their property. This approach of the first appellate Court seems to be completely erroneous, particularly, when the said determination of the first appellate Court is based on erroneous reasonings sans pleadings and evidence and hence the same appear to be based on the special pleadings formulated by it without any basis and in such view of the matter, it is found that the reliefs granted by the first appellate Court in favour of the plaintiffs on the abovelines cannot be allowed to sustain further and liable to be set aside. The substantial question of law formulated in this second appeal is accordingly answered in favour of the defendants and against the plaintiffs.

In conclusion, the Judgement and Decree dated 27.02.2003 passed in A.S.No.148 of 2001 on the file of the I Additional District Court cum Chief Judicial Magistrate Court, Salem, are set aside and the Judgment

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and Decree dated 07.06.2001 passed in O.S.No.1134 of 1996 on the file of the II Additional District Munsif court, Salem, are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

03.04.2018

Index : Yes / No

Internet : Yes / No

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To

1. The I Additional District Court
   cum Chief Judicial Magistrate Court, Salem.

2. The II Additional District Munsif Court, Salem.

3.The Section Officer, V.R.Section, High Court, Madras.

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T.RAVINDRAN, J.

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HIGH COURT OF JUDICATURE MADRAS
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Pre-Delivery Judgment made in S.A.No.446 of 2003

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